NOS. 11995, 11996, 11997

United States
Circuit Court of Appeals
For the Ninth Circuit

MARGIE LEE WALLAN, as Administratrix of the Estate of LANIER SARLES WALLAN, Deceased, etc.,

Appellant,

vs.

JOHN GILBERT RANKIN and R. S. NORSWING, co-partners, etc., R. S. NORSWING, individually, and SHIRLEY LORRAINE RANKIN, as Executrix, etc.,

Appellees.

THE FIRST NATIONAL BANK OF PORTLAND, as Executor of the Estate of JOHN B. ELIE, Deceased, etc.,

Appellant,

vs.

JOHN GILBERT RANKIN and R. S. NORSWING, etc., et al,

Appellees.

MILTON JAMES SCOTT THOMPSON,

Appellant,

vs.

JOHN GILBERT RANKIN and R. S. NORSWING, etc., et al,

Appellees.

APPELLANTS' REPLY BRIEF

Upon Appeal from the District Court of the United States for the Southern District of California Northern Division

Smith-Bates Printing Co., Klamath Falls, Oregon

NO. 11995

United States
Circuit Court of Appeals
For the Ninth Circuit

TITLE PAGE

No. 11995

MARGIE LEE WALLAN, as Administratrix of the Estate of LANIER SARLES WALLAN, Deceased, for and on behalf of the surviving widow, MARGIE LEE WALLAN, and the surviving daughters, BARBARA LEE WALLAN and SUSAN JEANETTE WALLAN,

Appellant,

vs.

JOHN GILBERT RANKIN and R. S. NORSWING, co-partners doing business under the assumed name and style of RANKIN AERONAUTICAL ACADEMY, and JOHN GILBERT RANKIN and R. S. NORSWING, co-partners, d.b.a. RANKIN AVIATION INDUSTRY; R. S. NORSWING, individually, and SHIRLEY LORRAINE RANKIN, as Executrix of the Estate of JOHN GILBERT RANKIN, Deceased,

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THE FIRST NATIONAL BANK OF PORTLAND, as Executor of the Estate of JOHN B. ELIE, Deceased, for and on behalf of the surviving widow, MATILDA C. ELIE, and the surviving daughter, JACQUELINE ELIE,

Appellant,

vs.

JOHN GILBERT RANKIN and R. S. NORSWING, co-partners, doing business under the assumed name and style of RANKIN AERONAUTICAL ACADEMY, JOHN GILBERT RANKIN and R. S. NORSWING, co-partners, d.b.a. RANKIN AVIATION INDUSTRY; R. S. NORSWING, individually, and SHIRLEY LORRAINE RANKIN, as Executrix of the Estate of JOHN GILBERT RANKIN, Deceased,

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APPELLANTS' REPLY BRIEF

PRELIMINARY STATEMENT

For reply to appellees' brief filed herein, appellants submit the following additional authorities and argument, with respect to the points made by appellees:

I.

APPELLANTS' REPLY TO APPELLEES' ARGUMENT "A":

Appellants' arguments with respect to the survival of appellants' causes of action against appellees, are contained in Proposition X, (pp. 17-21) of Appellants' Brief. Appellants' position is that the survival of a cause of action is a substantive right as distinguished from a procedural right and that, therefore, the general rule set for by appellees, with which we agree, is not applicable.

II.

APPELLANTS' REPLY TO APPELLEES' ARGUMENT "B":

Appellants admit that the capacity of an executor or administrator to be sued is governed by the law of the forum.

III.

APPELLANTS' REPLY TO APPELLEES' ARGUMENT "C":

1. The Doctrine of CLARK v. GOODWIN

The so-called doctrine of Clark v. Goodwin has been substantially weakened by the recent case of **MOFFAT v. SMITH,** 1948, 87 A.C.A. 877, 197 P. (2nd) 798. In this case, plaintiff sued seeking recovery of damages for injuries sustained in an automobile collision alleged to have been due to the negligence of one David D. Copenhaver. The latter having died subsequent to the accident, the action was brought against the executrix of his last will. Plaintiff's complaint alleged that he sustained injuries which would prevent him from carrying on his occupation as a chemical engineer, and from advancing in his profession as such; that he would otherwise be capable of earning large sums of money and that because of his injuries he had been deprived and will be deprived in the future of great gains and profits which he might otherwise have made to his damage in the sum of $50,000. The defendent filed a demurrer to the complaint on the grounds that the plaintiff's cause of action abated with the death of Copenhaver. The court said:

> "The only question presented here is did plaintiff's cause of action for future earnings abate with the death of the negligent tortfeasor."

The court then proceeded to quote at length from Section 574 of the Probate Code of California and the case of **HUNT v. AUTHIER,** and continued:

> "And while in that case it was the right of the survivors of a decedent whose life had been taken by the action of the tortfeasor that was involved, it would be an anomaly to hold that their right to future support from their decedent constituted property within the provisions of Section 574, supra, but that the right of a surviving victim of the tort to his own future support is not. And when the court in the Hunt case said that when a plaintiff has sustained an injury to his "estate" whether in being or expectant, such injury is an injury to property, it laid down a rule which governs the case before us."

The Hunt case changed the law with respect to survival of causes of action for tort in the State of California. It evidences a new "public policy". By virtue of this case, the case of appellant Thompson for personal injuries (No. 11997) should survive against the estates of the deceased wrongdoers. In any event, those damages alleged in his case with respect to pecuniary loss may clearly be recovered from the estate of the deceased wrongdoer under the authority of **MOFFAT v. SMITH.**

2. The doctrine of HUNT v. AUTHIER

The statutes of Oregon by O.C.L.A. Sec. 8-904, provides an action for wrongful death which, as interpreted by the Supreme Court of the State of Oregon in the case of **HANSEN v. HAYES,** cited in appellants' opening brief, allows damages measured by the pecuniary losses sustained by the benefic-

iaries under the statute. The Statutes of California by Sec. 574 of its Probate Code, as interpreted by the Supreme Court of the State of California in th case of **HUNT v. AUTHIER** allows damages to any person who has suffered an injury or loss to his estate. There is no difference between the type of action for wrongful death as provided for Oregon and that provided for in California under Section 574.

3. A foreign administrator or executor cannot maintain suit in this state.

As a general statement of the law, appellees' statement is correct. This was the rule at common law, the courts giving as the reason therefor that to provide otherwise would lead to possible loss to creditors of the deceased at the forum, such foreign executor or administrator not being accountable to the courts of the forum for the application of proceeds.

But to this rule there have always been several exceptions. A foreign administrator may sue upon a claim which had accrued to himself as distinguished from a claim which accrued to his decedent.

Fox v. Tay, 89 Cal. 339, 24 P. 855, 857 (1890)

Reed v. Hollister, 95 Ore. 656, 188 P. 170 (1920)

Moore v. Petty, (CCA 8th, 1905) 135, Fed. 668, 674

Cramer v. Phoenix Mutual Life Ins. Co. of Hartford, Conn., (CCA 8th, 1937) 91 F. (2nd) 141, 147

Turner v. Alton Banking and Trust Co., (CCA 8th, 1948) 166 F. (2nd) 305, 307

See also the following cases, cited by appellees:

Estate of Rowitzer, 175 Cal. 585, 587 (1917)

McCully v. Cooper, 114 Cal. 258, 261 (1896)

Appellants' actions for wrongful death were not claims belonging to their respective decedents. They arose by virtue of the deaths. They are such causes of action as accrue to an executor or administrator in his individual capacity by force of the Oregon wrongful death statute. Appellants are merely statutory trustees for any funds that come into their hands by virtue of their prosecution of these actions. They do not administer the funds either for the benefit of the estate, the decedents' creditors, or the heirs and legatees of decedent. Any moneys recovered are turnd over intact to the beneficiaries named in the statute. The widows and the minor children, not the plaintiff executor and administrator, the real parties in interest. (Cf. **NATWICK v. MOYER,** 177 Ore. 486, 496, 163 P. (2nd) 936, 940 (1945). The executor and administrator is only the tool used by the statute to effect recovery.

See also:

Pearson v. Norfolk & W. Ry. Co., (D.C. Va.) 286 F. 429, 431

Smith v. Bevins, (D.C. Md. 1944) 57 F. Supp. 760, 765

Dematei v. Missouri-Kansas-Texas Ry. Co., (1940) 345 Mo. 1136, 139 S. W. (2d) 504

LeMay v. Maddox (1946) 68 F. Supp. 25

Henkel v. Hood, (1945) 49 N. M. 45, 156 P. 2d 790

This precise point to appellants' knowledge has not been decided by the Supreme Court of either Oregon ~~and Washington~~ California and appellants urge the adoption of the liberal rule to give full effect to the transitory nature of tort actions of this type.

4. Actions for personal injuries abate upon the death of the wrongdoer.

Appellants have discussed this doctrine under their discussion of the "Doctrine of **Clark v. Goodwin**", supra.

5. The liability of the defendant, R. S. Norswing.

In both Oregon and California, the liability of a partnership for torts committed by one of the partners within the scope of the partnership relations is joint and several.

Sec. 79-305, O.C.L.A.
Sec. 79-307, O.C.L.A.
Sec. 2407, Civil Code of California
Sec. 2409, Civil Code of California

Phillips v. Lyon, 109 Cal. App. 264, 270, 292 Pac. 711 (1930)

Armstrong v. New LaPax Coal Mining Company, 107 Fed. 2nd 453

Warner v. DeArmond, 49 Or. 199; 89 Pac. 373

Kadota Fig Association of Producers v. Case-Swayne Co. (Calif.) 167 Pac. 2nd 518

Weaver v. Marcus, 165 Fed. 2nd 862; 175 A.L.R. 1305
Annotation 175 A.L.R. 1310

The death of one of the partners jointly and severally liable does not abate the cause of action against the surviving partner.

Kansas v. Winquist, 207 Minn. 315; 291 N. W. 294, 295 (1940)

Bartle v. Osburn (Wn.) 285 Pac. 425; 67 A.L.R. 1152

Rice v. VanWhy (Colo.) 111 Pac. 599

Phillips v. Gonzales, cited by appellees, is concerned with the liability of the executrix of the deceased tortfeasor, the Court holding the now discredited doctrine of **Clark v. Goodwin** that the action for personal injuries abated with the death of the tortfeasor, but with respect to the property damage to plaintiff's automobile allowed the action to survive against the executrix under the authority of Section 574 of the Probate Code of California. The case is not in point on the question of the tort liability of a surviving partner.

De La Torre v. Johnson cited by appellees is also concerned with the liability of an executrix for the tort of her deceased husband, and is not in point upon the liability of a surviving partner. In this

case, the court mentioned, as dicta, that if statutes created between the torfeasor and another party a "sort of privity or quasi contractural relation" the action would survive against such other partner.

Norswing is not sued as a personal representative of the deceased tortfeasor but as a surviving partner who has a several liability, hence it follows that the death of the other tortfeasor is immaterial so far as the liability of the defendant Norswing is concerned.

CONCLUSION

The orders granting appellees' motion to dismiss appellants' complaints and entering judgment for appellees should be overruled and the judgment of the lower court reversed.

Respectfully submitted,

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